No. 3854

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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FIRST NATIONAL BANK OF PARK RAPIDS (a corporation),

Plaintiff in Error,

vs.

R. F. PRAY,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

ALBERT A. ROSENSHINE,
GOLDMAN, NYE & SURR,
Attorneys for Defendant in Error.

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Introductory.

The appeal is based solely on what are claimed to be errors committed in excluding testimony and in granting defendant's motion for non-suit. We believe that all evidence ruled out as inadmissible was properly so held, and the non-suit was properly granted. We are also very sure that if error is present, it is without prejudice to plaintiff's cause, and that, in any event, non-suit should have been granted, especially as all the evidence offered by plaintiff (which constituted his whole case) was before the Court.

Plaintiff in error seems to concede that this correspondence constitutes the entire case, and bases his argument wholly on the question whether or not the letters excluded from the evidence were such that had they been admitted, plaintiff in error would have been entitled to recover.

> "It is incumbent upon the party appealing to show, not only abstract error, but error prejudicial to him on the facts in evidence."
>
> *Mintzer v. the City of Richmond*, 27 Cal. Appeals, 566.

> "Sec. 269. All of the said courts shall have power to grant new trials, in cases where there has been a trial by jury, for reasons for which new trials have usually been granted in the courts of law. On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."
>
> Act of Feb. 26, 1919, ch. 48, 40 Stat. L. 1181.

Statement of Facts.

Plaintiff in this cause seeks to recover from a guarantor whose guaranty appears upon a note maturing March 22, 1916. This promissory note reads as follows:

> "Park Rapids, Minn., March 22, 1915.
>
> March 22, 1916, after date (without grace) for value received, I promise to pay/to the

order of The First National Bank of Park Rapids, $4500.00 four thousand five hundred dollars with interest at the rate of 8 per cent per annum, payable annually from date, until paid. Payable at the First National Bank, Park Rapids, Minn. All the signers and endorsers hereby severally waive demand, notice of non-payment and protest.

THE WHITE STORES COMPANY,
By J. Shere, Pres.
By R. F. Pray, Secretary."

The guaranty appears upon the back of the instrument, as follows:

"For value received, I guarantee the payment of the within note at maturity or any time thereafter, waiving demand, protest, and notice of protest.

J. Shere
R. F. Pray."

The note also bears the following notation:

"Endorsement on principal 5/7/18 $993.21 Balance due on Principal, $3506.70."

The note is dated March 22, 1915. It was due March 22, 1916. It was barred by Sec. 337, C. C. P., March 22, 1920. The action was commenced on February 24, 1921. The complaint set forth is third amended.

The complaint is in two counts based upon the same instrument. Bound up in the first count, and hopelessly confused there seem to be present three several causes of action.

It contains first, a positive declaration that the date of maturity of the note itself was extended by

agreement to September 19, 1919. Secondly, it seems to attempt to set forth that the entirely distinct period commencing with maturity of the note and continuing until the cause of action would ordinarily have expired from statutory lapse of time was extended by agreement. And finally, the first count presents some features which we associate with complaints based on estoppel.

The second count is free from these complexities, and rests squarely upon an acknowledgment and promise to pay, relied upon by plaintiff to toll the Statute of Limitations.

Upon the note itself in the case at bar there appears to have been entered a part payment on May 7, 1918, by someone some twenty-two months before plaintiff in error's cause of action upon the note was barred. The payment was not made by this defendant. The action is upon defendant's several liability, and no payment by the principal debtor or by his co-guarantor could operate to extend the statute to affect the defendant in this cause, even if the law in California recognized part payment as acknowledgment, which it does not.

No evidence was offered as to part payment, and no ruling exists relating thereto for criticism.

Defendant relies upon the provisions of Section 337, C. C. P.

> "Actions that may be brought within four years.
>
> 1. An action upon any contract, obligation or liability (found) upon an instrument in writing."

Defendant also rests upon Section 360, C. C. P.

> "Acknowledgment or new promise must be in writing.
>
> No acknowledgment or promise is sufficient evidence of a new or continuing contract, by which to take the case out of the operation of this title, unless the same is contained in some writing, signed by the party to be charged thereby."

Points.

We will discuss the case under the four following heads:

I. Extension of date of maturity of note.

II. Prolongation by agreement, of the statutory period.

III. Estoppel to plead the Statute of Limitations.

IV. Acknowledgment and promise, tolling the statute.

Discussing Point I.

(EXTENSION OF DATE OF MATURITY OF NOTE.)

Nowhere in the evidence offered is there visible an extension or request by defendant in error for extension of as much as a single day, or any change of date of maturity, for the note itself. The brief of plaintiff does not touch upon such suggestion, and we can safely pass over, without further com-

ment, the allegation appearing in the complaint on page 4 of the transcript that,

> "plaintiff at the request of defendant extended the maturity of said note, and said maturity was extended to September 19, 1919".

Only three letters in evidence were ever written before maturity of note. The first of these (March 29, 1915) encloses the note itself, just made. The second letter (October 7, 1912) deals with another note ($1500.00). The third missive (February 21, 1916), written by plaintiff in error to defendant, by a postscript, confirms March, 1916, as the time for payment of the note in suit.

Discussing Point II.

(EXTENSION OF STATUTORY PERIOD.)

The period prescribed by law for the extinction of a cause of action by lapse of time was never extended by agreement in the instant case.

No letter offered in evidence written either by debtor or by creditor seeks such accommodation, or suggests the granting of such favor, had it been applied for.

The brief of plaintiff points to no foundation upon which such an extension could be predicated.

There is not one word in any of the correspondence asking for an extension, nor was there any agreement contemplated or made to extend the time for bringing suit on the original note. Suggestions

of compromise were made but none of them accepted. (These we discuss under Point III dealing with estoppel.)

Discussing Point III.

(ESTOPPEL.)

No statement of defendant to plaintiff is shown to have been in anywise false, or at all to have misled plaintiff. All the correspondence between the parties was frank, honest, open and above board, and no charge of fraud is even intimated in this action.

No act of defendant ever caused plaintiff to change its course of conduct in any respect or degree.

No circumstances are shown tending to prove that plaintiff's failure to bring suit within the statutory time was resultant from, or had ~~casual~~ causal connection with, any omission or commission of defendant.

With the offered evidence exposed, there is nothing to disturb our conjecture that plaintiff fell into the error of assuming that the laws of California gave as long a term in which to bring suit as is provided by the laws of Minnesota (viz., 6 years) and now seeks to saddle this inattention upon defendant.

> "The person asserting an estoppel must be induced to act or refrain from acting by his opponent's conduct."
>
> *Barnhart v. Fulkerth*, 93 Cal. 497.

"That such a promise should operate as an estoppel it must be made to appear, not only that she changed her position, but that relying upon such promise an injury resulted by reason thereof."

Mentry v. Broadway Bank etc., 129 Pac. 472; 20 Cal. App. 388.

"Estoppel cannot exist where the knowledge of both parties is equal, and nothing is done by one to mislead the other."

Eltinge v. Santos, 152 Pac. 918; 171 Cal. 278.

"An estoppel of the character herein relied upon cannot be predicated upon the mere expression of the intention or proposed future action of the party sought to be estopped, or upon the promise of such person to do or not to do in the future some particular act."

Thomson v. Langton, 187 Pac. 971; 31 C. A. D. 139, citing cases, including 153 Cal. 33.

We believe that no estoppel can be founded on a capricious forbearance arising from some cause other than an agreement to forbear.

Henshaw, J., speaks of:

"the indisputable proposition that while forbearance constitutes a good consideration, that forbearance must be under an agreement to forbear, and that mere forbearance alone is not sufficient".

In re Thomson's Estate, 131 Pac. 1048 (Cal.), 165 Cal. 290, citing,

Smith v. Compton, 6 Cal. 24; and

Shadburne v. Daly, 76 Cal. 355.

Lennon, P. J., says:

> "if they found that the plaintiff did in fact forbear to sue on the note, such forbearance would not constitute a good and valid consideration for the defendant's endorsement of the note, unless they should also find as a fact that such forbearance was founded upon and induced by a preceding promise to forbear".
>
> *Pac. Improvt. Co. v. Maxwell,* 146 Pac. 902 (Cal. App.), 26 Cal. App. 265.

A number of cases discussing estoppel to plead the Statute of Limitations are cited in *Quanchi v. Ben Lomond Wine Co.,* 120 Pac. 428 (Cal. App.), 17 Cal. App. 565, and the facts at bar will be found quite otherwise.

Discussing Point IV.

(ACKNOWLEDGMENT AND PROMISE.)

The correspondence appearing in the transcript does not measure up to the requirements of an acknowledgment and promise qualified to toll the Statute of Limitations.

Of the four parts composing plaintiff's brief, three are devoted to this topic.

The first deals with the distinction between acknowledgments made before and after the supervention of the statute.

The second seeks to obviate the necessity for an express promise as an accompaniment to an acknowledgment of debt.

The third part bolsters up and supplements the other two.

While we readily recognize that a contract or an acknowledgment may be made upon various and separate sheets, yet we do not believe that where a cause of action is already barred by the Statute of Limitations, the law will encourage the throwing together of a protracted correspondence, in an effort to distil from it in its entirety the essence of an acknowledgment which is wholly missing from any single letter. If a defendant has upon each successive occasion, when putting pen to paper, failed to acknowledge a debt, it cannot be that by multiplying the occasions on which he did not commit himself, a clear, convincing, unequivocal, and unconditional acknowledgment of debt, evincing an intent to pay, can result.

We join with counsel for appellant in seeking to keep clearly in mind any and all distinctions between acknowledgments made before statute run, and those made after it has obliterated the debt.

Where the statute has run, we recognize that suit must always be upon the new promise.

> "In this State under the code, whenever the action is brought after the statute has run, the plaintiff can avoid the demurrer to his complaint only by averring the new promise. The declaration is always on the new promise."
>
> *Curtis v. City of Sacramento,* 70 Cal. 416.

But when counsel states that before the statute has run, the action lies upon the old promise, given

new lease of life by acknowledgment, *he states the rule too broadly.*

Before the statute has run, if the acknowledgment is coupled with a single variation or condition, then the action does not lie upon the old promise, which sleeps on undisturbed, but the action is upon the substituted proposition, which must of course be pleaded.

In the case at bar, no substituted or conditional offer, or attempt at compromise is pleaded, and no letter of such character could have been admissible upon the trial.

We believe that the following postulates will be found to be the law.

A. The Statute of Limitations is a meritorious defense, and is a plea to the merits.

St. Paul Title & Trust v. Stensgaard, 121 Pac. 731; 162 Cal. 178;

Lilly-Brackett Co. v. Sonnemann, 157 Cal. 196;

Trower v. City & County, 157 Cal. 769;

Bullion & Exchange Bk. v. Hegler, 93 Fed. 890.

B. The acknowledgment must be a direct, unqualified and unconditional admission of a debt which a party is liable and willing to pay.

Bullion & Exchange Bk. v. Hegler, 93 Fed. 890;

Curtis v. City of Sacramento, 70 Cal. 412;

McCormick v. Brown, 36 Cal. 180;
Biddel v. Brizzolara, 56 Cal. 382;
Pierce v. Merrill, 128 Cal. 476;
Powell v. Petch, 166 Cal. 329; 136 P. 56;
Textile Nat'l. Bank v. Lawrence, 192 Pac. 881; 33 C. A. D. 15;
Snyder v. Dederichs, 179 Pac. 535; 39 Cal. App. 628.

C. The most positive acknowledgment of a pre-existing debt is insufficient if accompanied by a declaration which is inconsistent with an intention to pay.

Curtis v. City of Sacramento, 70 Cal. 412.

D. The acknowledgment referred to in the statute is not such as may be deduced by inference from a promise or an offer to pay a part of the debt.

Bullion & Exchange Bk. v. Hegler, 93 Fed. 890;
McCormick v. Brown, 36 Cal. 180.

E. Or to pay the whole debt in a particular manner.

McCormick v. Brown, 36 Cal. 180.

F. Or to pay the debt at a specified time.

McCormick v. Brown, 36 Cal. 180;

G. Or to pay the debt upon specified conditions.

McCormick v. Brown, 36 Cal. 180.
Rodgers v. Byers, 127 Cal. 528;
Van Buskirk v. Kuhns, 164 Cal. 472.

H. When the acknowledgment is accompanied by a particular promise, the law will imply none other.

Curtis v. City of Sacramento, 70 Cal. 412;
McCormick v. Brown, 36 Cal. 180;
Rodgers v. Byers, 127 Cal. 528;
Biddel v. Brizzolara, 56 Cal. 382;
Bullion & Exchange Bank v. Hegler, 93 Fed. 890.

I. If the acknowledgment contains any cause of action, the action must be based upon the substituted contract which the instrument expressly states, and not upon the original and different liability.

Curtis v. City of Sacramento, 70 Cal. 412;
McCormick v. Brown, 36 Cal. 180;
Rodgers v. Byers, 127 Cal. 528.

J. It must be certain as to amount.

Outwaters v. Brownlee, 135 Pac. 301; 22 Cal. App. 535.

K. "In most of the states a partial payment upon an account tolls the statute. The rule is otherwise in this State, because of Section 360 C. C. P., requiring a written acknowledgment."

Furlow Pressed Brick Co. v. Balboa Land & Water Co., 200 Pac. 629 (Cal.), 62 C. D. 290.

Illustrating what will not suffice.

The case of *Bullion & Exchange Bank v. Hegler,* 93 Fed., page 890, was one based on two promissory

notes. One of these notes was due and payable one year after the date thereof, namely, July 24, 1893. An action was begun on it on the 25th of October, 1895. The Statute of Limitations at that time was two years in California, on an obligation executed out of the State.

It was claimed by plaintiff that defendant in and by an instrument in writing, dated December 10, 1896, and certain other instruments in writing, acknowledged his liability and signified his willingness to pay the note. The defendant pleaded the Statute of Limitations as against this note. The letters in this case are strikingly similar to, though much stronger than, those written in the case at bar.

There, the defendant, in his first letter says:

> "Beg to say that I cannot pay the note or interest time, nor until I turn some realty or other property into cash, which seems impossible to me at present",

and in the second:

> "I don't see any chance for me to pay anything on them just now, nor for certain until I can sell some realty. When I can do this I can pay you at least a part."

There is an acknowledgment in both of these letters that the defendant is indebted to the plaintiff, but in neither case is it an acknowledgment from which a promise to pay a debt can be inferred. In other words, it is not an unqualified acknowledgment since it is accompanied with the condition that he cannot pay, or does not see any chance to pay, unless

he can turn some realty or other property into cash; and there is no evidence that this condition has been reached.

Judge Morrow held that these letters did not constitute such an acknowledgment or imply a promise sufficient to continue it for another statutory period of limitation, and says (page 894):

> "It is now well established by the authorities that the Statute of Limitations is to be upheld and enforced, not as arising merely upon the presumption that from the lapse of time the debt has been paid or released, but upon the broad ground that it is a statute of repose, for the peace and welfare of society, and is, therefore, to be regarded favorably * * *. If the statute were to be enforced upon the theory that it merely fixes a period of time, the running of which establishes a presumption of payment, then every promise or acknowledgment in writing that would justify and infer that the debt had not been paid would be sufficient to remove the presumption of payment, and fix a new period for the running of the statute, whether the contract is a subsisting liability, or not. But if, on the other hand, the statute is one of repose, then it is clear that the writing that will bar the statute should contain an express promise to pay a pre-existing debt, or acknowledge the existence of a present debt under such circumstances that a promise to pay it can be inferred * * *".

Calling the obligation an "indebtedness" is not sufficient to toll the statute.

Powell v. Petch, 136 Pac. 56; 166 Cal. 329.

Textile Nat. Bank v. Lawrence, 192 Pac. 880-881; 33 C. A. D. 15:

Letter as follows:

"Mr. H. Brockelhurst, c/o Textile National Bank, Philadelphia—Dear Sir: I fully realize your position, but also know my own. I agreed to pay the Jones note at the rate of $25.00 a month, and did so until I received a peremptory demand from Mr. Darling to pay the collateral loan, advised that if not paid the bonds would be sold and you would immediately proceed against me for the difference.

I want to pay you one hundred cents on the dollar, unless you destroy my ability to make the hundred cents, and a suit for either item would cause just as much damage as for both of them. I am perfectly willing to make a monthly payment of $25.00 now, and can do so. My prospects are getting better all the time, and my business has been developed by me from nothing to the point where it may interest outside capital. There is a project now to form a Bush terminal here, if so, my present plant is the natural nucleus. In any event, if you and your associates can see your way clear to accept a monthly payment at this time, you can depend upon it that my account will be eventually balanced without a penny of loss. I do not want any lawsuits at any time, as it can do only harm and cannot hasten matters.

I am going to be in Cincinnati as a delegate in July, and expect to be in Philadelphia for a few days. I will be glad then to state to you frankly how I am situated.

Yours very truly, V. C. Lawrence."

Nixon v. Ramsey, 180 Pac. 649-650; 40 Cal. App. 240:

Letter as follows:

"Jan. 14th, 1915.

"It is impossible right at the present time—for me to pay any part of the above amount—I hope to be able some time soon to hole thing thing up—I am not making any promises—I hope to be able to pay the hole thing up some day.

H. Ramsey."

Snyder v. Dederichs, 179 Pac. 535; 39 Cal. App. 628:

Letter as follows:

"Your letter received in regard to the money I did get from Willard. * * * Still if I would make money, and see my way through, I would send you some money, and I will the first chance that I make something I will help you. * * * I loaned a party some money which he promised sure by next month I would get $300 of it. Should I succeed in this I will send you sure $150 or $200 of this. At the present time I cannot do anything on account I have not it. I know, Mrs. Snyder, the disposition how you feel, and I hope Willard makes some money soon. He has been working hard always the same as I and you know if I got it I would help you, but it is impossible to do so at the present time."

Morehouse v. Morehouse, 69 Pac. 625-627; 6 Cal. Un. 966:

Oral statement of deceased that he would pay the money "as soon as convenient, or sooner, as soon as he could get it out of the ranch, or from Mr. Barron".

Sherwood v. Lowell, 167 Pac. 554; 34 Cal. App. 365.

Outwaters v. Brownlee, 135 Pac. 300-301; 22 Cal. App. 535:

Written statement as follows:

"(I) It is clear that, to bring the case within the contemplation of section 360 of the Code of Civil Procedure, there must be a distinct and unconditional admission of the debt which the party is liable for and willing to pay or a direct and unqualified promise to pay the amount of the indebtedness. If the acknowledgment be complete, the law will supply the promise to pay; and if the instrument itself contain a sufficient promise, no further acknowledgment of the debt is required.

In Weinberger v. Weidman, 134 Cal. 602, 66 Pac. 870, it is said: 'The promise to pay is that which renews the obligation, and no acknowledgment is sufficient unless it at least implies a promise'."

Visher v. Wilbur, 90 Pac. 1065-1068; 5 Cal. App. 562:

"Dear Sir and Brother: Your favor of the 14th is just received and noted. In answer will say that if the Visher estate has any valid claim against me I will pay it, if I ever get money enough to do so. Please send me the claim."

Powell v. Petch, 136 Pac. 55-56; 166 Cal. 329:

"What is the status of my indebtedness to you regarding the lot you bought? The money that I advanced Nonie was intended to offset it, but let me know the condition."

Pierce v. Merrill, 61 Pac. 67; 128 Cal. 464:

"Los Angeles, Cal., September 19, 1893. Orestes Pierce, Esq.—Dear Sir: I have delayed answering yr. letter relative to the bal-

ance due you as taken from the Sather Banking Co., of some $1,700, because of a contract to deliver to the Citrus Belt Irrigation Dist. 300 inches of water, and receive $150 M. bonds. I thought we could use a portion of these bonds in some way to wipe out all the company might owe you. There has been a delay in completing the title to the water, because the water stock was held by the San Francisco Savings Union, but they have agreed, upon a favorable report as to the legal status of the bond, to release their holdings, and take some $60 M bonds as collateral instead of the stock. This favorable report on bonds will be forwarded in two or three days, and then, by the action of the directors of the companies, all will be completed. There seems to be no hitch from any source to prevent the completion of the contract and receive the bonds. As soon as this is accomplished, either myself or some representative of the Semitropic Company will visit you and see if we cannot make some satisfactory arrangement with you. Very truly, yours, Samuel Merrill."

The following is the telegram: "San Bernardino, Cal., December 1st. Orestes Pierce, 728 Montgomery St., San Francisco: Make no assignment of our debt. Insist on payment. Must have my stock. Please send as soon as possible. S. Merrill."

Rodgers v. Byers, 60 Pac. 42-43; 127 Cal. 528:

"I will liquidate that note as soon as I can get the money.

I wish it was in my power to send you money at this time, but it is not. Will send you some as soon as I can get it. I hope to get money soon. Will sell cattle at first good offer.

I have no intention of not paying the note, and will as soon as I can; but can't now."

Curtis and others v. City of Sacramento, 11 Pac. 748; 70 Cal. 412:

"Whereas, the city of Sacramento is indebted to the firm of Curtis & Clunie for legal services rendered by said firm in the several actions; * * * and whereas, the board of trustees of said city and said firm differ as to the amount of said indebtedness."

Review of the letters.

Approaching these letters offered in the case at bar with our decisions in view, we may first cull out all letters written prior to *February 24, 1917,* as not within four years prior to action. If they contained anything of a reviving nature, the statute has run again, since they were written. We may also prune away all letters written after March 22, 1920, since the action is upon the old promise, and not upon any new promise. It would have to be upon the new promise if any letter later than March 22, 1920, were relied upon.

Next, we may eliminate all letters written by persons other than defendant himself.

There will then remain the following:

November 26, 1918,
December 11, 1918,
August 8, 1919,
September 19, 1919,
October 4, 1919.

The letter of *November 26, 1918,* throws no light at all. Do the four letters, viz: December 11, 1918, August 8, 1919, September 19, 1919, and October

4, 1919, constitute an admission of debt coupled with an intent to pay?

Defendant writes (December 11, 1918) that he has just received a letter from the attorneys for the trustee of the principal debtor,

> "saying that there was in the hands of trustee considerable amount for distribution to the creditors of that company, and the distribution would soon be made.
>
> When this is done, I should be very glad to hear from you again. Please understand I do not wish to stall this matter off, but believe it is only proper to apply the distribution which you receive on these notes before making settlement."

Here is no request for time or representation to mislead. It was a fact true and undisputed. Defendant was far away in California. Plaintiff was not far from Duluth where certain funds had accumulated. Giving this language the most extraordinary force, we cannot extract from it more than an intimation of an intent to make some sort of settlement, and that only *upon condition* of the proper application of certain other monies. etc.

As the decisions show, *any condition* dispels the idea of an acknowledgment, and further, they agree that the action where the letter contains conditions, must found itself on that letter and on those conditions, and not on the original promise. The pleadings at bar are solely on the original promise. Defendant's proposal was not satisfactory to plaintiff, and did not influence his conduct.

The letter of *August 8, 1919,* is still more vulnerable.

> "I wrote Mr. Shere and told him about this offer, and asked him to pay half of *this settlement,* and *if he did,* I would pay the other half, and thus wipe this note out. Mr. Shere did not respond, and I have written him again on the subject, * * * Would you not kindly ascertain Mr. Shere's address and take the matter up with him direct, and see if you cannot get *half of the amount that Mr. Tabor offered to settle for,* and I will send the other half, and get it out of the way."

This whole letter discusses a compromise agreement, wholly incompatible with the implication of a promise to pay the full amount. We bear in mind that where an acknowledgment of debt is coupled with anything to detract from an implication of an intent to pay the whole debt, the law holds that there is not present an acknowledgment that will satisfy Section 360, C. C. P. Further, the offer is purely conditional. If Shere will pay half of *a proposed amount* (not the amount of the note) Pray will pay the other half of such *proposed* amount, otherwise not. We also note that the action is not based upon this letter, but on the original and distinct promise.

The letter of *September 19, 1919,* begs plaintiff to bring suit.

> "See no way in which my legal rights may be determined any other way."

Clearly, defendant was relying upon some of his defenses other than the Statute of Limitations, as at that time it had not run its length. We fail to

see how plaintiff construes this letter as containing an implied promise to pay.

By his letter of *October 4, 1919,* defendant squarely declines a compromise offer which knocks off fully half the debt. This can hardly be taken as showing a willingness to pay the whole debt. Again, he requests an action, saying:

> "I referred the matter to my attorney out here and he thinks it will be satisfactory, in order to determine just what my liability is, to have suit brot on the note."

After such a letter, written more than five months before the statute ran, it would seem clear that the defendant was anxious to face the issue, and felt prepared to meet it, without the aid of the statute. Nothing short of gross negligence can be attributed to the plaintiff bank after the defendant had begged in two successive months that suit be filed.

We now epitomize the entire correspondence.

Pith of the correspondence.

Taking up the letters in their order:

March 29, 1915 (Tr. page 46)—This letter merely encloses the note in question.

October 7, 1915 (Tr. page 47)—This letter acknowledges receipt of the note by plaintiff.

February 21, 1916 (Tr. page 47)—This letter from plaintiff merely calls attention to the fact that the note in question will be due on March 22nd.

May 23, 1916 (Tr. page 49)—Defendant declines plaintiff's suggestion that the bank will assign a mortgage to him.

June 1, 1916 (Tr. page 50)—Plaintiff requests defendant to sign new notes which defendant never does.

November 19, 1918 (Tr. page 52)—Plaintiff suggests that defendant pay one-half of the note.

November 26, 1918 (Tr. page 53)—Defendant says he will write later in reply to above.

December 2, 1918 (Tr. page 54)—Plaintiff requests defendant to give a final answer before the 15th of December.

December 11, 1918 (Tr. page 54)—Defendant says he is not anxious to stall in this matter and wants to know how much money the trustee will pay on the note.

December 16, 1918 (Tr. page 55)—Plaintiff requests defendant to accept their former proposition and they will pay him one-half that they get from the trustee.

July 31, 1919 (Tr. page 56)—Demand for payment made by plaintiff's attorney.

August 8, 1919 (Tr. page 57)—Defendant says if Shere will pay one-half, he will pay one-half.

August 29, 1919 (Tr. page 59)—Plaintiff's attorney writes Shere can do nothing. Bank withdraws offer and will not settle on basis suggested on November 19, 1918.

September 19, 1919 (Tr. page 60)—Plaintiff writes he cannot get help from Shere and let the bank sue.

September 29, 1919 (Tr. page 61)—Attorney for bank writes asking defendant to accept Shere's note for one-half the amount.

October 4, 1919 (Tr. page 62)—Defendant writes declining above and notifying bank to sue.

June 26, 1920 (Tr. page 62)—Plaintiff's attorney writes that bank would take $2500 and pay one-half amount received from trustee.

July 22, 1920 (Tr. page 64)—Defendant replies let the bank sue.

In construing all this correspondence, we think there is one controlling principle.

Either we have to take the letters singly and find one strong and clear enough to toll the statute, or we must lump all the correspondence together and take the flavor of the whole. But if we attempt to treat all the letters as one instrument, we then find present more than one expression declaring a positive unwillingness on Pray's part to pay the half of the indebtedness which Pray all along regarded as Shere's share.

Viewed singly, no letter is strong enough for plaintiff to rest upon. Regarded unitedly, any thought of an acknowledgment within the meaning of the statute is destroyed by repeated invitations to sue, suggestions to collect from Shere, and from

the principal debtor, and other expressions wholly shutting out any implied promise to pay the whole.

Analysis of plaintiff's citations as to acknowledgments.

Plaintiff cites *Southern Pacific Co. v. Prosser,* 122 Cal. 413. That case recognizes, in the same paragraph quoted by plaintiff, that where there is an intimation (not an expression) of an intent to refuse payment, no promise arises by implication from the acknowledgment. Judge Beatty, as ever, touches the key note, saying,

> "As we read the document, it was an unqualified admission of an existing debt *which defendant desired to pay.*"

That desire to pay *the entire debt* never took hold of defendant in this cause. If the correspondence may be taken by the plaintiff by the four corners as a single document, to create an acknowledgment, it must also be so taken as a single document to destroy the implication. Read as a whole, it plainly shows defendant's attitude, and many of the letters, taken severally, declare Pray's unwillingness to meet more than what he considered his just share of loss.

Plaintiff also cites *Concannon v. Smith,* 134 Cal. 20. That case discusses part payment. It is not the law today in California that part payment constitutes an acknowledgment. The quotation from *Barron v. Kennedy,* 17 Cal. 574, deals with the law before Section 360 C. C. P. was enacted (see Judge Wilbur's declaration in 200 Pac. 629, wherein it is

made clear that these earlier cases no longer control, but we think the part payment feature in *Concannon v. Smith,* is dictum, though erroneous).

Plaintiff cites *Moore v. Gould,* 151 Cal. 723. In that case (page 729):

> "Following the copy of the seven hundred dollar note signed by Peterson the mortgage reads as follows:
>
> 'Said last note of $700 is secured by mortgage and time of payment of said note has been extended to July 18th, 1899. And the mortgagors promise to pay said notes according to the terms and conditions thereof.'
>
> Here is a direct promise to pay the note, following a recital that the time of payment has been extended to July 18, 1899. * * * Construing the language as importing a promise to pay the seven hundred dollar note on July 18, 1899, the action, commenced on February 17, 1903, was not barred by Sec. 337, C. C. P."

McCormick v. Nofziger, 10 Cal. App. 241,

is next relied upon. That case does not even tell us what the language of the acknowledgment was, merely saying,

> "that on June 6, 1906, defendant in writing acknowledged its obligation in the sum of $400.00 to plaintiff".

Tuggle v. Minor, 76 Cal. 99, is cited.

In that case, defendant made out in his own handwriting a clear itemized account, bringing down a balance, writing upon it:

> "On my return from New York, I will settle the above account with P. Tuggle personally.

> Oct. 6, 1879, B. B. Minor.
> Oct. 4, 1881, This agreement renewed this day. B. B. Minor."

What else could the word "settle" mean in this instance, except pay? In the case at bar, when the defendant used the word "settle", the proposition under discussion to be settled was a proposition not to pay the whole, but to pay less. And no suit has been brought upon that proposal which never became final.

In *Auzerais v. Naglee,* 74 Cal. 67, the Court said:

> "We think that there can be little doubt but (sic) that the term "settle" has a double meaning, and is used alike to denote an adjustment of a demand, and a payment.
>
> This being so, it was proper for the author of the letter continuing the declaration to explain in which of the two senses he used the expression.
>
> In other words, there was an ambiguity upon the face of the instrument."

Plaintiff next cites *Minifie v. Rowley,* 202 Pac. 673. The intent of the defendant in that case to recognize his debt is at once gathered from his letter, emphasized by the accompanying remittance.

We believe that the quotation from *Minifie v. Rowley,* that

> "there may be an acknowledgment by conduct as well as words",

is not the law of California today. It was dictum in the case where it appears. However that may

be, the case at bar is based wholly on correspondence, and conduct does not enter.

The Court says, at page 675:

> "The effect of this provision (C. C. P. 360) is not to require that the new or continuing contract must consist of a written acknowledgment or promise. There may be an acknowledgment by conduct as well as by words. In the case of a part payment, for instance, of either principal or interest, the conduct itself has always been deemed, unless accompanied by qualifications, an unequivocal acknowledgment of the subsisting contract or liability from which a new contract to pay the debt must be inferred. Section 360 of the Code of Civil Procedure makes an attempt to regulate the character of the acknowledgment itself. Its sole purpose is to order the form of the evidence to prevent a parole proof of the acknowledgment or promise, whether the latter be in the form of words, or acts. Therefore, where an act of payment after the statutory period is evidenced by a clear and unqualified written memorandum, the acknowledgment is contained in some writing within the meaning of the code sections, even though the writing itself does not contain a distinct recognition of the subsisting liability. The acknowledgment consists of an act of payment, from which a new contract is inferred."

In *Curtis v. Holee*, 195 Pac. 397, cited by plaintiff, the Court says:

> "While the extension agreement in the instant case does not, in so many words, make mention of the mortgage, still that agreement was written upon the back of the mortgage note, and made express reference thereto.

> The note upon its face, bore the caption 'note secured by mortgage', and therefore considered and construed in connection with the note to which it referred, the agreement to extend the time for the payment of the note constituted an unqualified acknowledgment of the mortgage and the debt secured thereby, sufficiently *direct and distinct* to arrest the running of the Statute of Limitations."

On page 26 of its brief appellant cites *Furlow v. Balboa,* 200 Pac. 629; 62 C. D. 290, as holding that the mere entry of payment upon the open book account tolls the statute. We think that counsel here has seized on loose language, and that the question decided in that case was not what would *revive* the statute, but merely just when it *started running* on a book account. The exact language is as follows:

> (p. 629) "In most of the states a partial payment upon an account tolls the statute. The rule is otherwise in this State, because of Section 360, C. C. P., requiring a written acknowlment, but it is a reasonable construction of the legislation fixing a different period of limitation upon an open book account from an ordinary account to hold that the payment made and entered upon the open book account tolls the statute. It follows that the Statute of Limitations began to run on this account on August 13, 1914, and that the amended complaint filed May 15, 1918, was within the four years."

Plaintiff cites *Foster v. Bowles,* 138 Cal. 350. The Court there says:

> "The note and mortgage were in full force and unaffected by the Statute of Limitations when respondents made their written agree-

ment of December 30, 1893, in which they clearly recognized and acknowledged the existence of the mortgage in question and made provision for payment of interest thereon out of income from the premises.

Also a few days earlier in the same month, the trust deed to which they were parties, and which they accepted in this agreement of December 30th, by express recital declared, 'And whereas, there is now existing a mortgage for the sum of about twenty thousand dollars against said tract hereinbefore described,' and provided for payments on account of this mortgage, and thus expressly acknowledged the existence of the indebtedness, as well as of the mortgage."

We have no quarrel with the law in *Worth v. Worth,* 155 Cal. 599, or with *Chaffee v. Brown,* 109 Cal. 211. In the latter case, the opinion does not recite the language which sufficed for an acknowledgment.

Clunin v. First Federal Trust Co., 35 C. A. D. 746 (July 26, 1921);

"The acknowledgment and payment both being embodied in the check and being in writing, the fact does not rest to be proved by oral testimony. * * * It seems to be the general doctrine that the writing, in order to constitute an acknowledgment, must recognize an existing debt, and that it should contain nothing inconsistent with an intention on the part of the debtor to pay it. But oral evidence may be resorted to, as in other cases of written instruments, in aid of interpretation."

Cotcher v. Barton, 33 C. A. D. 144 (Sept. 11, 1920).

This case is inconsistent with 200 Pac. 629 if it holds that a payment of interest suffices for an acknowledgment. Probably the true rule in that regard is that a payment of interest, nothing more being shown is not a sufficient acknowledgment, but that if such payment be by check containing a memorandum referring to the principal sum and signed by the party, as all checks are, then the mere fact that the acknowledgment is thus manifest upon a check instead of upon some other piece of paper is immaterial. As we have pointed out before, the defendant guarantor, made no payment in the case at bar, the action is against him on his several liability, and the above question while of great general interest, does not concern us here.

In *Auzerais v. Naglee,* 74 Cal. 69, Naglee himself wrote upon the very account itself:

> "Received, December 8, 1880, of Henry M. Naglee, one thousand dollars on account of the within."

Thereupon Auzerais signed the receipt. The Court said:

> "The part payment was evidenced by a writing. It was in the handwriting of defendant. His signature was contained thereon. The Statute does not require the party to *subscribe* his name."

The Court held that Naglee had "signed", though he had not "subscribed" his name.

CONCLUSION.

Plaintiff's analysis of the correspondence between plaintiff and defendant seems to be based on the theory that any mention of the note by defendant which did not deny his liability on the note would constitute a sufficient acknowledgment to toll the statute and that in order for defendant to plead the statute as a defense and to be successful in such a defense, it would be necessary for him either to remain silent when written to by plaintiff, or to have stated in each letter replying to the plaintiff that he did not owe the money. If the theory contended for by plaintiff is correct, then the case of *Bullion and Exchange Bank v. Hegler,* 93 Fed., page 890, and the many other cases cited by us and holding that the cause of action was barred by the Statute of Limitations, have been erroneously decided, because in each of these cases the defendant mentioned the obligation in some way.

In the letter of May 23, 1916, defendant says (Tr. page 50):

> "I am not in a position at this time to take advantage of the offer made in the last paragraph of your letter."

In other words, Mr. Pray had merely declined the request for payment made in behalf of plaintiff.

The case of *Woodville Bank v. Ricker,* 82 Atl. 2 (Vt.), cited by plaintiff on page 32 of the Brief, has no bearing, because there is no provision in the

Vermont Statute similar to our Section 360 of the Code of Civil Procedure.

Plaintiff argues that if these letters do not constitute an acknowledgment of the debt, it is difficult to see what they mean. The same argument would be true of the following language in the Bullion case:

> "Have neglected answering your letter calling my attention to note and interest due. Referring to the notes I don't see any chance for me to pay anything on them just now, nor for certain until I can sell some realty. When I can do this I can pay you at least a part."

Certainly in the Bullion case there was no repudiation, no conditional offer, nor any express promise.

Plaintiff maintains, on page 32 of his Brief:

> "These letters are either an acknowledgment or repudiation of the debt."

As a matter of fact, they were neither. While plaintiff maintains "there can be no middle ground", we must emphatically maintain that there not only can be, but that in all the cases we have cited as illustrations there was a middle ground. By merely mentioning the note defendant did not acknowledge the debt, within the meaning of C. C. P., Sec. 360, nor did he necessarily repudiate it. But it is certain that by merely mentioning the debt, he did not waive the defense granted to him by Sections 337 and 339 of the Code of Civil Procedure.

Before the statute had run, and during the time when most of these letters had passed, defendant had taken the position that plaintiff should begin suit. This was not necessarily a denial of liability, but plaintiff construes it as an acknowledgment of indebtedness. The fact of the matter is, and the correspondence shows, that plaintiff was constantly endeavoring to make some kind of settlement with defendant, but that defendant and plaintiff never did agree on any term of settlement, and that before the Statute of Limitations had run in California, defendant had told plaintiff in at least two letters that it should sue him. Had plaintiff done this within the five or six months left it, there could have been no defense of the Statute of Limitations.

The delay in this case was not caused by the acts of defendant as plaintiff suggests, because the correspondence clearly shows that plaintiff was delaying for reasons of its own, and that they were constantly making suggestions to defendant to make part payment. The delay was the delay of the plaintiff and not the delay caused by the defendant.

In his letter of August 8, 1919 (Trans. page 57), defendant wrote:

> "If you can get a half from Mr. Shere, I will send the other half, and get it out of the way."

Plaintiff replied that it could not get the money. This certainly did not constitute a sufficient written acknowledgment within the meaning of our statute and the decisions interpreting it, so that it could

be converted into a new promise to pay the whole obligation.

Here we have no evidence of a new or continuing contract by which to take the case out of the operation of the statute, and an invitation to sue cannot certainly be construed into an extension of the statute.

While plaintiff argues that this Court is bound by the California cases and by the interpretations placed on the California statutes by the Courts of this State, he has endeavored to bolster up his argument by numerous citations from other jurisdictions whose rules governing limitations do not agree with those of California.

It cannot be that, in the face of the provisions of our code, the letters offered by plaintiff were either separately or collectively admissible to prove either a tolling of the statute or a new promise, such as is required under our law. It follows that the non-suit granted in this case was granted properly, and even had the letters been admitted that the Court must have granted a non-suit because the letters did not constitute a waiver of defendant's right to plead the Statute of Limitations, and his right to successfully set it up as a defense, nor did these letters singly, or collectively, constitute a waiver of that right, or take the defense away from defendant, but defendant could always successfully rely on this defense in the State of California.

We again wish to emphasize the erroneous position taken by plaintiff that because there was no repudiation of the obligation (if invitations to begin suit do not constitute repudiation) there could be no successful plea of the Statute of Limitations, and that any mention of the note made by defendant would constitute an acknowledgment.

The true rule is laid down by Judge Morrow in the case of *Bullion and Exchange Bank v. Hegler,* when he says (page 895):

> "There is an acknowledgment in both of these letters that the defendant is indebted to the plaintiff, but in neither case is it an acknowledgment from which a promise to pay the debt can be inferred."

We submit that all rulings on the trial were proper, and that no prejudice has resulted, regardless of the rulings.

Dated, San Francisco,
May 13, 1922.

Respectfully submitted,

ALBERT A. ROSENSHINE,
GOLDMAN, NYE & SURR,
Attorneys for Defendant in Error.